United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7299

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

ISAAC JAROSLAWICZ and JOSEPH JAROSLAWICZ,

Plaintiffs-Appellants,

vs.

ALBERT A. SEEDMAN,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

JULIEN & SCHLESINGER, P.C.
Attorneys for Plaintiffs-Appellants
2 Lafayette Street
New York, New York 10007
(212) 962-8020

ALFRED S. JULIEN
STUART A. SCHLESINGER
Of Counsel

(8526) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (201) 783-7288

INDEX

Table of Authorities

Table of Authorities - Continued

Other Authorities

75-7299

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

ISAAC JAROSLAWICZ and JOSEPH JAROSLAWICZ,

Plaintiffs-Appellants,

vs.

ALBERT A. SEEDMAN,

Defendant-Appellee.

PLAINTIFFS-APPELLANTS' REPLY BRIEF

Introductory Statement

This reply brief is being submitted by the plaintiffs-appellants in response to the appellee's brief which contains numerous misstatements of fact and misleading innuendo totally unsupported by the record and obviously intended to sway the Court at a hearing of this appeal.* It is

*See, e.g., the statement at p. 10 of the appellee's brief insinuating that one of the alleged witnesses -- Jacobson -- was somehow 'intimidated' and afraid to identify the plaintiff.

respectfully suggested that in reading the appellee's brief special care be taken to ascertain that prejudicial statements unsupported by the record are ignored.

On or about October 20, 1971 four shots were fired through a window of the Soviet Mission to the United Nations located in the City of New York. Immediately after the shooting the Russian Ambassador to the United Nations, Yakov A. Malik, attacked the United States for failing to curb the "zionist hooligans" in its midst (JA 50). There had been absolutely no evidence to indicate who had been responsible for the shooting or that anyone associated with a zionist movement had in any way been involved.

The defendant was then Chief of Detectives (JA 14), was desperate for a 'quick face saving break' (JA 50), and was anxious to "have something to show for our investigation fast" (JA 50). The defendant obviously decided that if the Soviet Ambassador had determined that a zionist hooligan was responsible for the shotting, the best way to mollify the Russians was to arrest a member of the Jewish Defense League ("JDL") -- the closest available thing to a zionist hooligan. Unfortunately for the plaintiff in this action, the plaintiff was the person chosen by the defendant to be arrested and charged with a crime which he did not commit and of which he had no knowledge.

The defendant attempts to justify his actions by claiming that he had probable cause to arrest the plaintiff based upon a supposed eye witness identification of the plaintiff by two employees of the gun shop where the rifle used in the shooting had been purchased (appellee's brief, p. 8). In fact, the defendant had no probable cause to arrest the plaintiff, admittedly the plaintiff had done nothing to violate local or state law (JA 52) and the alleged eye witness identification was obtained by the defendant under questionable circumstances and by the use of an unfair line-up which was directed at having the plaintiff selected (JA 3, 37-40).

The plaintiff, of course, did not commit any crime and was arrested by the defendant merely for the sake of convenience so as to be able to mollify the Russians (JA 53). After several months when the person who had purchased the rifle in question was apprehended, all charges against the plaintiff were dismissed (JA 60).

POINT I

THERE WAS NO PROBABLE CAUSE FOR THE DEFENDANT TO ORDER THE PLAINTIFF'S ARREST.

The appellee does not deny that he ordered the plaintiff's arrest (JA 51), but instead bases his entire defense to this action upon the proposition that he had probable cause to arrest the plaintiff based upon an alleged eye witness identification.

The defendant's contention in his brief that he did not order the plaintiff's arrest but only his custodial detention for investigative purposes is frivolous. In the absence of a specific federal statute, state law will govern as to what constitutes an arrest. See United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222 (1948). In People v. Cantor, 36 N.Y.2d 106, 365 N.Y.S.2d 509 (1975), the New York Court of Appeals made it clear that an arrest takes place:

> "Whenever an individual is physically or constructively detained by virtue of a significant interruption of his liberty of movement as a result of police action, that individual has been seized within the meaning of the Fourth Amendment (Terry v. Ohio, supra). This is true whether a person submits to the authority of the badge or whether he succumbs to force. Here the defendant was deprived of his freedom of movement when he was encircled by three police officers as he stood alongside his car which was blocked by the police vehicle. At that moment he could not have proceeded on his way, therefore he was seized. (See, e.g., United States v. Nicholas, 8 Cir. 448 F.2d 622; United States v. Strickler, 9 Cir., 490 F.2d 378)" (365 N.Y.S.2d at 515)

There can be no question that the plaintiff was under arrest the moment the police officers approached the automobile in which he was sitting and directed him to accompany them to the precinct. See Henry v. United States, 361 U.S. 98, 80 S.Ct. 168 (1959). For the purposes of this appeal, the appellee has accepted the plaintiff's contention that the plaintiff did not voluntarily accompany the police officers to the stationhouse (appellee's brief, p.8). The plaintiff was thus under arrest the moment the police

officers directed that he leave his automobile and accompany them to the stationhouse.

The defendant's entire defense thus hinges upon the question of whether or not there was probable cause to arrest the plaintiff at the time the arrest was made. In Beck v. The State of Ohio, 379 U.S. 89, 85 S.Ct. 223 (1964), the Court stated in language directly applicable to this case:

> "Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it -- whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." (379 U.S. at 91)

It is also clear that for the plaintiff's arrest to have been valid, probable cause must have existed at the moment the arrest was made and cannot be bolstered by information subsequently discovered after the arrest. As the Court stated in Henry v. United States, supra:

> "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete. It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses * * * ." (361 U.S. at 103)

See, also, United States v. Guana-Sanchez, 484 F.2d 590 (7th Cir. 1973) where the Court stated:

> "The warrantless arrest must be judged as of the time it was made. It could not be aided by the post facto developments * * * . (at 592)

Admittedly, the only possible information in the possession of the defendant at the time he directed the plaintiff's arrest was the selection of the photographs of the plaintiff and one Lawrence Fine as being the possible purchaser of the rifle which had been used in the shooting by Jacobson and Aull, two employees of the gun shop in which the rifle in question had been purchased (JA 16).

It is interesting to note that photographs of the plaintiff and Fine were selected from a collection of JDL members shown to the two witnesses and that the defendant knew the owner of the gun shop so that its employees were anxious to cooperate with the defendant and help in making an identification (JA 51). The plaintiff at this time, of course, has no way of knowing how it came about that the plaintiff's photograph was selected as one of the two possible purchasers. There is conspicuously absent from the defendant's moving papers seeking summary judgment an affidavit from either Jacobson or Aull attesting as to the manner in which they selected the plaintiff's photograph.

We are not advised as to how it came about that the photographs of the plaintiff and Fine were selected as possible purchasers when Fine's appearance differs so radically from that of the plaintiff's and Fine is approximately ten years older than the plaintiff. In addition, we are not told whether or not the photograph of Gary Shlian, the person who later pleaded guilty to the crime the plaintiff had been accused of (JA 60-61), and who was also allegedly a member of the JDL, was shown to these two eye witnesses and how close a resemblance, if any, Shlian bears to either the plaintiff or Fine.

In addition, it is disconcerting to find that where the defendant has admitted that the plaintiff was selected as being one of two persons who were possible purchasers of the rifle in question, the appellee in his brief has transformed this into statements that the plaintiff had been identified as the probable purchaser (appellee's brief, p. 3) and as the purchaser (appellee's brief, p. 8). There is absolutely no support in the record for anything other than the fact that the two gun shop employees had selected the plaintiff's photograph under unknown and questionable circumstances in an attempt to cooperate with the police as a possible purchaser and that no positive identification of the plaintiff had been made.

The appellee's additional contention that the plaintiff who resided in Brooklyn was observed by police in an automobile on 67th Street near the Soviet Mission (appellee's brief, p. 8) as somehow indicative of the fact that the plaintiff was found at the scene of the crime is completely and totally misleading. The defendant is well aware that the plaintiff has not denied that he was a member of the JDL and that the JDL at that time was conducting various orderly and constitutionally protected demonstrations as close to the Soviet Mission as they were permitted by the Police Department to protest the Russian's treatment of Soviet Jews.

If the defendant was seeking to locate the plaintiff, he was well-aware that he could be located as could any other JDL member -- in the vicinity of the Soviet Mission while a demonstration was taking place. This was the natural place for him to be. There is absolutely no malicious purpose or criminal attempt which can be gleaned from the plaintiff's presence in the vicinity of the Soviet Mission. When all of the verbiage has been pruned, it becomes apparent that the only possible information in the possession of the defendant or the New York City Police Department which tended to connect the plaintiff with the shooting at the Russian Mission was the tentative identification by two gun shop employees of the plaintiff's photograph as one of the two persons who had possibly purchased the rifle used in the shooting. It was based solely upon this tentative and nebulous

photographic identification that the defendant ordered the plaintiff's arrest. The arrest was not based upon probable cause, but rather upon the fact that the defendant was anxious to see fast results (JA 53) and was under abnormal pressure to get results fast (JA 51).

The subsequent alleged identification of the plaintiff by Aull, one of the gun shop employees, after the plaintiff's arrest cannot buttress or bootstrap an initial, illegal and warrantless arrest into a legal one. See Henry v. United States, supra and United States v. Guana-Sanchez, supra.

POINT II

THE MANNER IN WHICH THE PLAINTIFF WAS INTERROGATED AFTER HIS ARREST AND THE MANNER IN WHICH THE LINE-UP AT WHICH HE WAS ALLEGEDLY IDENTIFIED BRISTLE WITH QUESTIONS OF FACT AS TO WHETHER OR NOT THEY WERE GEARED TO SELECT THE PLAINTIFF AND WERE A VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

After the plaintiff was arrested and in police custody, the plaintiff alleges that he was in custody for over ten hours without being told what he was being charged with (JA 3); that he was denied the right to counsel although he had specifically requested counsel (JA 3, 37, 39); that he was continuously interrogated without counsel present; and that he was placed in a line-up which was geared toward having the plaintiff selected

(JA 3, 37, 40). Naturally all of these allegations are either ignored or disputed by the appellee. Those allegations which are uncontradicted must be accepted as true and those which are contradicted and disputed create an issue of fact which must be determined by a jury and cannot be decided by the Court on a motion for summary judgment.

The principal issue in contention is the manner in which Aull allegedly identified the plaintiff at the line-up. The plaintiff to this day has no way of knowing if Aull actually did identify the plaintiff at the line-up and there is no affidavit by Aull in support of the defendant's motion for summary judgment.

Even if one accepts the defendant's version of the manner in which the line-up took place, the line-up was still so unduly suggestive as to be violative of the plaintiff's constituional rights. See Foster v. California, 394 U.S. 440 (1969). The defendant admits that the gun shop employees were shown the plaintiff's photograph prior to the line-up (JA 16). He also admits that Jacobson and Aull returned to the stationhouse with the detectives when they noticed the plaintiff in an automobile and directed the plaintiff to accompany them to the stationhouse (JA 16). It is clear that Jacobson and Aull witnessed the plaintiff being placed under arrest by New York City Police Detectives, and any subsequent

identification which they made of the plaintiff was necessarily tainted and violative of the plaintiff's constitutional rights. Despite all of the foregoing, Jacobson still selected a police officer out of the line-up (JA 16). In his book, the defendant alleges that Jacobson did identify the plaintiff hesitantly (JA 52). There is absolutely no support in the record for the position taken by the appellee in his brief (p. 10) that Jacobson after initially selecting a police officer, then tentatively pointed out the plaintiff. This is merely another instance where the appellee in his brief has made statements totally unsupported by the record which are prejudicial and can only serve to mislead the Court.

The defendant in support of his motion for summary judgment does not attempt to provide any information as to how the line-up took place nor to dispute the plaintiff's allegations (JA 5) that the line-up was unfair and that all of the other persons in the line-up were at least ten years older than he was. Instead, the appellee merely makes the conclusory, unsupported statement that a certain attorney named Zweibon participated in the formation of the line-up (appellee's brief, p. 10). Even the defendant does not allege that Zweibon was the plaintiff's counsel during the line-up. Even more confusing is the finding by the District Court below that the plaintiff was represented

by attorney Harvey J. Michelman or that Mr. Michelman was present at the line-up (JA 67). Even the appellee does not claim that Michelman represented the plaintiff at the line-up.

The plaintiff's claim that the line-up was unfair and geared to having the plaintiff picked out thus stands uncontested and must be accepted as true. In short, the appellee totally ignores the plaintiff's contention that the line-up was unfair and was directed at having the plaintiff selected, but then relies upon the fact that the plaintiff was allegedly selected out of this line-up as the alleged probable cause for the plaintiff's arrest. As has been previously shown, the plaintiff's arrest took place before the line-up identification ever took place.

In his brief, the defendant makes the additional argument that the plaintiff while under so-called custodial interrogation refused to supply a handwriting sample to the police, therefore providing additional probable cause to suspect that the plaintiff was guilty of a crime (appellee's brief, p. 32). The defendant's argument is totally spurious. The defendant had ready access to various samples of the plaintiff's handwriting and could have easily obtained legal handwriting exemplars from the plaintiff while he was in his custody. The cases are clear that neither the Fifth Amendment, see Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951 (1967), nor the Fourth Amendment, see United States v. Mara, 410 U.S. 19, 93 S.Ct. 774

(1973) and United States v. Doe, 457 F.2d 895 (2d. Cir. 1972), prohibited the appellee's from obtaining a handwriting sample from a person suspected of a crime. The defendant easily could have obtained a handwriting sample from the plaintiff to compare with the signature of Henry Faulkner, the name given by the person purchasing the rifle used in the shooting. The defendant in this case, however, had no real interest in discovering the plaintiff's innocence. There was no pressure on the defendant to discover who had not fired the shots at the Soviet Mission. Conversely, there was abnormal pressure upon the defendant to get fast results (JA 51) and to be able to arrest someone, preferably a zionist hooligan so that

> "In the morning George Bush could stand up at the UN and mollify the Russians by announcing that an arrest had already been made." (emphasis supplied) (JA 53)

Similarly, the defendant's attempt to make a distinction between a formal arrest and custodial interrogation cannot justify the defendant's conduct in this case. The Supreme Court in Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394 (1969) stated in language directly applicable to this case:

> "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions'. We made this explicit only last Term in Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868, 1878, 1879, 20 L.Ed.2d 889 (1968), when we rejected 'the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest or a full blown search.' " (emphasis added)(394 U.S. at 727)

The cases cited by the defendant in support of the proposition that a limited custodial interrogation is permitted under certain circumstances likewise do not support his position in this case. People v. Morales, 22 N.Y.2d 55, 290 N.Y.S.2d 898 (1968), dealt with a situation where prior to being taken into custody, the defendant was advised of the subject matter of the investigation, the right to remain silent and his right to counsel and voluntarily agreed to speak to the police (290 N.Y.S.2d at 901). This is directly contrary to the situation in our case where the plaintiff was not advised of what crime he was being accused of, what crime was being investigated, was denied the right to counsel and was interrogated without the presence of counsel despite his request for counsel (JA 3, 37, 39, 40). In Morales, the Court stated:

> "Where, as here, the defendant is advised of his rights, he is confronted with a clear choice. If he declines to talk, the police must release him unless they have probable cause to arrest on a charge of crime." (290 N.Y.S.2d at 906)

This was directly contrary to the procedure in our case where the plaintiff requested counsel, declined to speak with the appellee and nevertheless was maintained in police custody. Morales does not permit custodial interrogation of such a nature. The Court there clearly stated:

> "This decision is, therefore, limited to the exceptional circumstances presented on this appeal involving a serious crime affecting the public safety. We hold merely that a suspect may be detained upon reasonable suspicion for a reasonable and brief period of time

> for questioning under carefully controlled conditions protecting his Fifth and Sixth Amendment rights." (290 N.Y.S.2d at 907)

Similarly, the other cases cited by the defendant do not support his position. United States v. Vita, 294 F.2d 524 (2d. Cir. 1961), cert. denied, 369 U.S. 823 (1962), likewise dealt with a situation where a suspect voluntarily agreed to talk to the police and the Court there stated:

> "Having chosen to talk with the F.B.I. agents, Vita cannot now be heard to complain because his calculated risk worked to his disadvantage." (294 F.2d at 529)

United States v. Middleton, 344 F.2d 78 (2d. Cir. 1965) cited by the District Court in its decision (JA 70) likewise does not support the defendant's position here. In Middleton the defendant had voluntarily agreed to speak with the police, but the police overstepped their limit and continued to question Middleton after they had sufficient evidence to constitute probable cause for Middleton's arrest. The Court in Middleton stated:

> "We simply hold that where the detention is unreasonable in length and its purpose is not investigatory, but to keep the accused in custody for an indefinite period until he confesses, statements taken may not be received in evidence at a later trial, particularly where grounds for an arrest or a warrant of arrest existed for some time before the accused confessed." (at 83)

For the same proposition, see United States v. Martinez, 465 F.2d 79 (2d. Cir. 1972), where the Court stated:

> "Nor will such an arrest be valid when it was merely a ploy used to afford agents or police the time and opportunity to investigate and amass facts sufficient to constitute probable cause." (at 82)

In our case the defendant admits that by 8:00 p.m. (JA 16), or according to a different version given by the defendant (JA 52), 9:00 p.m., their line-up had already taken place and the witness Aull had already identified the plaintiff. Nevertheless, the plaintiff was not formally charged with the crime until 4:00 a.m. (JA 53). Admittedly, there was no other additional evidence obtained by the police department between 9:00 p.m. when the line-up took place and 4:00 p.m. when the plaintiff was formally charged. This is precisely the sort of situation excluded from the narrow custodial interrogation doctrine set out in Middleton, supra.

In our case the defendant had the plaintiff arrested simply because the Russians had to be mollified with an announcement that an arrest had been made. The defendant admittedly knew that the plaintiff "had done nothing to violate local or state law" (JA 52). In order to avoid releasing the plaintiff from custody, the defendant called in federal agents to charge the plaintiff with purchasing a gun with false identification (JA 52).

When the federal agents balked at arresting the plaintiff, the defendant personally called the United States Attorney in an attempt to convince him to have the plaintiff arrested right away (JA 52-53). It is a rare case that a plaintiff is able to prove out of the mouth and pen of the police officers who violated his constitutional rights under color of state law that such a violation has taken place.

It would be a miscarriage of justice to permit the defendant in this action to avoid explaining to a jury the admissions contained in his book that he had the plaintiff arrested as a matter of convenience because he was under abnormal pressure to get results fast (JA 51). It is precisely such contentions as are made by the appellee in his brief (p. 42) that the admissions made by the defendant in his book are the product of literary license which are questions of fact to be determined by a jury and not by the Court on a motion for summary judgment.

POINT III

AT THE VERY LEAST THE PLAINTIFF IS ENTITLED TO DISCOVERY TO OBTAIN THE TESTIMONY OF THE DEFENDANT, OTHER POLICE OFFICERS AND THE IDENTIFYING WITNESSES IN ORDER TO DETERMINE WHETHER OR NOT THERE WAS PROBABLE CAUSE FOR THE PLAINTIFF'S ARREST.

The defendant's entire defense in this case is based upon the allegation that there was probable cause for him to order the plaintiff's

arrest based upon the alleged eye witness identifications which admittedly did not occur until after the plaintiff had already been arrested.

At the very least the defendant's motion for summary judgment should have been denied until the plaintiff had an opportunity to obtain the testimony of the defendant, police officers who actually arrested the plaintiff and the two identifying witnesses so as to determine under what circumstances they identified the plaintiff and whether or not there was probable cause for the defendant to order the plaintiff's arrest or if the defendant had ordered the plaintiff's arrest to mollify the Russians and later sought evidence to support his prior actions.

It is well settled that summary judgment should not be issued until the party opposing the summary judgment motion has had a fair opportunity to conduct such discovery as may be necessary. See Illinois State Employees Union, Council 34, ETC. v. Lewis, 473 F.2d 561 (7th Cir. 1972), cert. denied, 93 S.Ct. 1364, 1370 (1973); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971); Penn Galvanizing Company v. Lukens Steel Company, 59 F.R.D. 74, 80 (E.D.Pa. 1973); Harlem River Consum. Coop., Inc. v. Associated Groc. of Harlem, Inc., 53 F.R.D. 691 (S.D.N.Y. 1971); Erie Technological Prod., Inc. v. Centre Engineering, Inc., 52 F.R.D. 524, 529 (M.D. Pa. 1971).

See also Federal Rules of Civil Procedure, Rule 56(f).

Particularly in the instant case where the admissions made by the defendant in his book directly contradict the statements made by him in his affidavit in support of his motion for summary judgment, the plaintiff was entitled to obtain the defendant's testimony before the District Court ruled on the summary judgment motion.

CONCLUSION

In light of the fact that there are genuine issues of material fact as to whether or not there was probable cause for the defendant to order the plaintiff's arrest, summary judgment should not have been granted. The order of the court below should be reversed and the plaintiff should be permitted to have a jury determine all of the questions of fact in this case.

Respectfully submitted,

Julien & Schlesinger, P.C.
Attorneys for Plaintiffs-Appellants
2 Lafayette Street
New York, New York 10007
(212) 962-8020

Of Counsel

Alfred S. Julien
Stuart A. Schlesinger

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ISAAC JAROSLAWICZ et ano., Plaintiffs-Appellants, - against - ALBERT A. SEEDMAN, Defendant-Appellee,	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the 20th *day of* October *19*75 *at* Municipal Bldg, N.Y., N.Y.

deponent served the annexed Reply Briefs *upon*

W. Bernard Richland

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 20th *day of* October *19* 75

Robert T. Brin

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977